

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

601 NEW JERSEY AVENUE, NW

SUITE 9500

WASHINGTON, DC 20001

March 23, 2007

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA)

v.

JERRY ALLEN, JR., employed by  
MARTIN MARIETTA MATERIALS, INC.

:  
:  
:  
:  
:  
:  
:  
:  
:

Docket No. WEVA 2007-284  
A.C. No. 46-08862-102285 A

BEFORE: Duffy, Chairman; Jordan and Young, Commissioners

ORDER

BY THE COMMISSION:

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2000) (“Mine Act”). On March 1, 2007, the Commission received from Jerry Allen, Jr. (“Allen”) a motion by counsel seeking to reopen a penalty assessment against Allen under section 110(c) of the Mine Act, 30 U.S.C. § 820(c), that had become a final order of the Commission pursuant to section 105(a) of the Mine Act, 30 U.S.C. § 815(a).

Under the Commission’s Procedural Rules, an individual charged under section 110(c) has 30 days following receipt of the proposed penalty assessment within which to notify the Secretary of Labor that he or she wishes to contest the penalty. 29 C.F.R. § 2700.26. If the individual fails to notify the Secretary, the proposed penalty assessment is deemed a final order of the Commission. 29 C.F.R. § 2700.27.

On November 1, 2006, the Department of Labor’s Mine Safety and Health Administration (“MSHA”) mailed a proposed penalty assessment to Allen, alleging that he was personally liable under section 110(c) of the Mine Act for an order, No. 6035585, issued to his employer, Martin Marietta Materials, Inc. MSHA mailed the proposed penalty assessment to

Allen at an address that was incorrect.<sup>1</sup> Accordingly, Allen states that he never received the proposed assessment form and that it was returned to MSHA with the notations, “return to sender” and “unable to forward,” stamped on the envelope. The certified return receipt card was unsigned. On February 19, 2007, Allen received a delinquency notice from MSHA stating that the proposed penalty assessment had become a final order of the Commission. On February 20, Allen’s counsel was able to obtain a copy of the proposed assessment.

Allen, through counsel, states that, because service was not complete, he was unable to contest the penalty previously. He further maintains that service of the assessment was not complete until February 20, when his counsel received the penalty assessment. The Secretary states that she does not oppose Allen’s request to reopen the penalty assessment.

Here, the proposed penalty assessment was mailed to the wrong address, and Allen never received it. Under these circumstances, we conclude that Allen was not notified of the penalty assessment, within the meaning of the Commission’s Procedural Rules, until February 20, 2007. In his motion to reopen this matter, filed with the Commission on March 1, Allen clearly states his intent to contest the proposed penalty assessment against him. We conclude from this that Allen timely notified the Secretary that he contests the proposed penalty. *See Stech, employed by Eighty-Four Mining Co.*, 27 FMSHRC 891, 892 (Dec. 2005).

---

<sup>1</sup> MSHA mailed the assessment to a post-office box number that was similar, but not identical, to that of Allen’s employer. MSHA apparently did not attempt to mail the proposed penalty assessment to Allen at his home address.

Accordingly, the proposed penalty assessment is not a final order of the Commission. We remand this matter to the Chief Administrative Law Judge for assignment to a judge. This case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

---

Michael F. Duffy, Chairman

---

Mary Lu Jordan, Commissioner

---

Michael G. Young, Commissioner

## Distribution

Karen L. Johnston, Esq.  
Jackson Kelly PLLC  
1099 18<sup>th</sup> Street, Suite 2150  
Denver, CO 80202

W. Christian Schumann, Esq.  
Office of the Solicitor  
U.S. Department of Labor  
1100 Wilson Blvd., 22<sup>nd</sup> Floor  
Arlington, VA 22209-2296

Chief Administrative Law Judge Robert J. Lesnick  
Federal Mine Safety & Health Review Commission  
601 New Jersey Avenue, N.W., Suite 9500  
Washington, D.C. 20001-2021